

Original filed 8/31/06

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK L. JOHNSON,

Petitioner,

vs.

A.K. SCRIBNER,

Respondent.

No. C 03-0274 JF (PR)

ORDER TO SHOW CAUSE

On December 7, 2004, the Court dismissed the instant petition for writ of habeas corpus without prejudice for Petitioner's failure to pay the filing fee. On January 4, 2005, the Court granted Petitioner an extension of time to file a motion for reconsideration. On January 18, 2005, Petitioner filed his motion for reconsideration. The Court granted Petitioner's motion for reconsideration, vacated the judgment and reopened the instant action on September 16, 2005. The Court orders Respondent to show cause why the amended petition should not be granted.

STATEMENT

An Alameda Superior Court jury convicted Petitioner of first degree murder with the personal use of a firearm and discharge of a firearm at an occupied vehicle causing death. With an enhancement for his prior "strike" conviction under California's "Three

1 Strikes” law, Petitioner was sentenced to sixty-five years-to-life in state prison on March
2 24, 2000. Petitioner appealed his conviction. The state appellate court affirmed the
3 judgment on October 18, 2001. The state supreme court denied a petition for review on
4 January 23, 2002. Petitioner filed state habeas petitions in the state appellate court and
5 state supreme court, which were both denied as of January 23, 2002. The instant federal
6 habeas petition was filed on January 22, 2003. The Court granted Petitioner leave to file
7 an amended petition. Petitioner filed an amended petition on September 12, 2003.
8 Thereafter, the Court dismissed the instant petition for Petitioner’s failure to pay the filing
9 fee. On September 16, 2005, the Court granted Petitioner’s motion for reconsideration,
10 vacated the judgment and reopened the instant action.

11 DISCUSSION

12 A. Standard of Review

13 A district court may entertain a petition for writ of habeas corpus “in behalf of a
14 person in custody pursuant to the judgment of a State court only on the ground that he is
15 in custody in violation of the Constitution or laws or treaties of the United States.” 28
16 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

17 A district court shall “award the writ or issue an order directing the respondent to
18 show cause why the writ should not be granted, unless it appears from the application that
19 the applicant or person detained is not entitled thereto.” 28 U.S.C. § 2243.

20 B. Petitioner’s Claims

21 Petitioner alleges the following claims for federal habeas relief: (1) Petitioner was
22 deprived of his Sixth and Fourteenth Amendment right to effective assistance of trial
23 counsel resulting in a fundamental miscarriage of justice; (2) the trial court erred in
24 violation of Cal. Penal Code §§ 1367, 1369 when the court failed, before it decided that
25 Petitioner was competent, to appoint the director of the regional center for the
26 developmentally disabled to evaluate him to determine if a developmental disability
27 rendered him incompetent to stand trial; (3) trial counsel’s failure to effectively assist
28 Petitioner in connection with the trial court’s failure to appoint the regional center

1 director violated Petitioner's rights under the Sixth Amendment; (4) ineffective assistance
 2 of trial counsel in counsel's failure to request CAL JIC No. 8.73 which would have
 3 informed the jury that "provocation" can reduce a homicide from first degree murder to
 4 second degree murder, requiring reversal of Petitioner's first degree murder conviction;
 5 (5) ineffective assistance of trial counsel in counsel's failure to request the mental
 6 disorder instruction pursuant to CAL JIC No. 3.32; and (6) Petitioner was denied
 7 effective assistance of appellate counsel under the Sixth and Fourteenth Amendments.
 8 Liberally construed, Petitioner's claims are sufficient to require a response. The Court
 9 orders Respondent to show cause why the amended petition should not be granted.

10 CONCLUSION

11 1. The Clerk shall serve by mail a copy of the amended petition (docket no. 6)
 12 and all attachments thereto upon Respondent and Respondent's attorney, the Attorney
 13 General of the State of California.

14 2. Respondent shall file with the Court and serve on Petitioner, within **sixty**
 15 **days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the
 16 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should
 17 not be granted. Respondent shall file with the answer and serve on Petitioner a copy of
 18 all portions of the state trial record that have been transcribed previously and that are
 19 relevant to a determination of the issues presented by the petition.

20 If Petitioner wishes to respond to the answer, he shall do so by filing a traverse
 21 with the Court and serving a copy on Respondent within **thirty days** of his receipt of the
 22 answer.

23 3. Respondent may file a motion to dismiss on procedural grounds in lieu of
 24 an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules
 25 Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall file
 26 with the Court and serve on Respondent an opposition or statement of non-opposition
 27 within **thirty days** of receipt of the motion, and Respondent shall file with the Court and
 28 serve on Petitioner a reply within **fifteen days** of receipt of any opposition.

1 4. It is Petitioner's responsibility to prosecute this case. Petitioner must keep
2 the Court and all parties informed of any change of address by filing a separate paper
3 captioned "Notice of Change of Address." He must comply with the Court's orders in a
4 timely fashion. Failure to do so may result in the dismissal of this action for failure to
5 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6 IT IS SO ORDERED.

7 DATED: ____ 8/31/06

8 /S/ 
JEREMY FOGEL
United States District Judge

1 A copy of this order was mailed to the following:

2 Frederick L. Johnson
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4 CSP - Sacramento
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